No. 95-621

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In The

Supreme Court of the United States

October Term, 1995

DELORES LAVERN WASHINGTON, WILBERT ALBERGOTTIE, CARLETHIA BENTLEY and LAVERN PEARSON,

Petitioners,

vs.

HORACE CREEL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether there exist "special and important reasons" for the grant of a writ of certiorari where the petition only challenges the sufficiency of the evidence to support a jury instruction?

2. Whether there existed sufficient evidence for the district court to instruct the trial jury on the state common law tort doctrine of "sudden emergency"?

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

On July 30, 1992, the petitioner Delores Washington filed this civil action for alleged wrongful deaths against the respondent and against the former co-defendants Patricia Manning and Manning Lumber Company and commenced to perfect her claim for underinsured motorists insurance benefits against South Carolina Farm Bureau Mutual Insurance Co. On October 16, 1992, the district court ordered that petitioners Wilbert Albergottie, Carlethia Bentley and Lavern Pearson be added as plaintiffs. On November 30, 1992, the district court dismissed the former co-defendant Manning Lumber Company for want of prosecution. On December 31, 1992, the district court ordered that Middleton Logging Company be added as a defendant. On October 12, 1993, the district court dismissed the former co-defendant Patricia Manning with prejudice pursuant to a settlement and did the same on December 15, 1993 for the former co-defendant Middleton Logging Company.

Also on December 15, 1993, the trial of this action began with the respondent Horace Creel as the only defendant. The trial was before a jury. The district court instructed the jury on the state law tort rule of "sudden emergency".

On December 21, 1993, the jury returned a verdict in favor of the respondent and against the petitioners.

The petitioners moved for judgment notwithstanding the verdict or, alternatively, for a new trial. On January 26, 1994, the district court denied both motions "conclud[ing . . .] that the instruction of the 'sudden emergency' rule was properly given to the jury, since the determination of whether the Defendant created the emergency conditions is an issue of fact and the jury was so instructed." (Petition, Appendix A).

The petitioners appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court and then denied a motion for rehearing, each decision without opinion.

B. Statement of the Facts

This action is for the alleged wrongful deaths of two persons resulting from a vehicular collision.

The case involved a collision of three trucks on a two-laned highway in Pierce County in southeast Georgia. The respondent was driving a tractor and trailer carrying a tree-felling tractor. Francis Manning, the decedent of the former defendant Patricia Manning, was driving a pick-up truck following the respondent's tractor-trailer. Another pick-up truck, occupied by the petitioners' decedents, was travelling in the opposite direction on the same highway. Shortly before the collision, the Manning pick-up truck passed the respondent's tractor-trailer and then braked. The respondent's tractor-trailer swerved to the right and ran off the highway but was not able to avoid striking the rear of the Manning pick-up truck. The initial collision propelled the Manning truck into the path of the petitioners' decedents' truck. The secondary collision resulted in the deaths of the petitioners' decedents.

Francis Manning operated a logging business. The respondent was his employee. Other employees and they finished cutting the timber on one tract of land on the day of the accident and were moving their logging equipment by means of public roads to a new tract of land about 20 miles distant. None of the employees knew the location of the new tract of land. Francis Manning's stated intent was to lead other vehicles carrying his employees and equipment to the new tract by having them follow him in his pick-up truck, but he was delayed, and rather than

leading the respondent's tractor-trailer, he followed it until he passed it prior to the collision. All eyewitnesses agreed that prior to the accident, the respondent's vehicle was travelling at speed of between 45 mph and 50 mph at a location where the speed limit was 55 mph. The respondent's vehicle, because of the weight of the machinery which it carried, was flashing its emergency flashers. The collision occurred where the highway on which the vehicles were travelling intersected the dirt road on which the new tract of timber was located when Francis Manning slowed his pick-up truck to make a left turn. The intersection was in a small valley, and the record contains evidence that Francis Manning's view was obstructed by the crest of a small hill about a tenth of a mile from the point of the accident. The record contains evidence which supports the inference that Francis Manning passed the respondent's tractor-trailer, crested the small hill about a tenth of a mile away, realized too late that he was upon his intended turn, and abruptly braked.

The record contains evidence that the respondent had only an instant to react. He unsuccessfully attempted to avoid the collision by driving off the side of the highway.

After the collision, a state public service commission vehicle inspector determined that some of the brakes on the respondent's tractor-trailer were out of adjustment but testified that his opinion was that the physical evidence was consistent with respondent's testimony that he did not have time to apply his brakes. The investigating law enforcement officer at the scene of the accident testified that Francis Manning's view would have been blocked by "a little hill crest . . . about a tenth of a mile" from the point of the collision, which would be consistent with an abrupt stop. The respondent testified that Manning passed him and then abruptly slowed.

REASONS FOR DENYING THE WRIT

I.

THE PETITION DOES NOT MEET THE REQUIREMENT OF RULE 10.

The petitioners allege only that the evidence was insufficient to support a jury instruction. The petition does not present "special and important reasons" for the grant of a writ of certiorari. The case does not involve conflicting decisions of courts of appeal. It does not involve a federal question. It does not involve "an important question of federal law which has not been, but should be, settled by this Court . . ." Rule of the Supreme Court of the United States 10.

The petition does not satisfy the only other basis specified in Rule 10 for the grant of the writ, that a court of appeal "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." The trial of this case resulted in evidence both supporting and contradicting the petitioners' factual theory of liability. The factual dispute was to be resolved by a jury, and the jury instruction in question was necessary for them to correctly apply state tort law. The case is tragic because of the loss of life, but the legal issue presented is mundane.

II.

THE TRIAL COURT CORRECTLY INSTRUCTED ITS JURY ON "THE SUDDEN EMERGENCY DOCTRINE."

The district court's instruction to its jury in regard to the substantive state law "sudden emergency rule" was required by the evidence.

In this diversity action, state law is the controlling substantive law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Federal procedure controls. State law determines the substantive correctness of the charge. *TDS, Inc. v. Shelby Mutual Insurance Co.*, 760 F.2d 1520 (11th Cir. 1985), *reh. denied*, 769 F.2d 1485.

The charge as given was substantively accurate. It was taken verbatim from Devitt, Blackmar and Wolff, *Federal Jury Practice and Instructions*, § 80.24, even to the extent that the pattern instruction refers to a vehicle which "came to a sudden stop."[1]

In Georgia jurisprudence, the circumstance of a trailing vehicle striking a leading vehicle which unexpectedly stops in a roadway is a commonly-occurring application of the sudden emergency doctrine and a jury instruction thereon. *See, e.g., Boatright v. Sosebee*, 108 Ga. App. 19, 132 S.E. 2d 155 (1963). Evidence that an injury occurred when the driver of a leading vehicle braked quickly causing a following vehicle to strike the leading vehicle not only authorizes, but requires, a charge on emergency. *Gordon v. Gordon*, 133 Ga. App. 520, 211 S.E. 2d 374 (1974).

The petitioners' premise is that a failure of the respondent's vehicle's brakes constituted the sudden emergency but that this condition did not present a defense to the respondent because he was at least partially responsible for the condition of the brakes. To the contrary, the brake condition was not the emergency. The alleged emergency occurred, as the district court expressedly charged, when the leading vehicle "suddenly slowed down," a

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1. The district court quoted the pattern instruction with the exception that the court substituted the term "vehicle" for the term "automobile" because the vehicles involved in the present case were trucks rather than cars.

circumstance over which the respondent had no control or responsibility. The district court's instruction was explicit that the evidence which the jury could consider to constitute a sudden emergency consisted only of the evidence in regard to the sudden stopping of the leading vehicle. The district court instructed,

> If you find from a preponderance of evidence therefore that the defendant was following a vehicle on a highway at a proper distance while maintaining a proper rate of speed, and that the vehicle in front of him came to a sudden stop, thereby causing a sudden emergency, and that the emergency was not brought about by the defendant's negligence, and that thereafter the defendant acted in a prudent manner as a reasonable person would have done under the circumstances, then he would not be negligent and your verdict should be for the defendant.

Because there was evidence that the condition of the respondent's truck's brakes did not proximately cause the accident, he was entitled to have the jury consider the sudden emergency rule to determine whether his failure to avoid the collision, either by means of evasive maneuver or by means of braking, constituted actionable negligence.

The petitioners cite cases to support the premise that the instruction is not warranted if a defendant participates in the creation of the emergency. These citations do not control. In each, the person seeking to rely upon the emergency caused it. In *Thomas v. Shahan*, 213 Ga. App. 484, 444 S.E. 2d 851 (1994), the uncontroverted evidence was that the defendant, who alleged emergency, had driven an automobile onto the wrong side of a road and that the emergency, a potential head-on collision, was thus attributable to him. In *Johnston v. Woody*, 148 Ga. App. 152,

250 S.E. 2d 873 (1978), in which the trial court's refusal to charge emergency was affirmed, the uncontroverted evidence was that the defendant in an automobile case was speeding and thus contributed to the alleged emergency. In *Taylor v. Bair*, 414 F.2d 815 (5th Cir. 1969) (applying Texas law), a verdict directed for a defendant on the basis of emergency was reversed, and the opinion does not involve the sufficiency of evidence to support an instruction on emergency. *Henthorn v. Long*, 146 W. Va. 636, 122 S.E. 2d at 195 (1961) (applying West Virginia law) "is somewhat unique in that apparently there is no contention that [the leading vehicle which had been stopped in the road for twelve seconds] was guilty of the slightest negligence in the premises and apparently there is no basis for such an implication or contention." In each of these cases, the person who had caused the emergency then attempted to use it as an excuse. In the present case, the petitioners assume that the brakes were the emergency, but the district court's explicit instruction was that it was "a sudden stop" by the leading vehicle which could be considered to be an emergency.

The petitioners' final complaint is the allegation that the record does not contain evidence that the respondent was faced with a required choice of conduct. The petitioners' theory of the accident was that the respondent saw the leading vehicle stopped, that he attempted to stop his truck with its brakes, that the brakes failed, and that the respondent's truck struck the leading truck squarely. The preponderance of the evidence was that the respondent did not apply his brakes, that he attempted to avoid a collision by driving off the highway, but that he struck the leading vehicle a glancing blow on the corner of its bumper. The choice represented by these two theories of the reconstruction of the accident, between braking and avoidance maneuvering, constitute a choice of conduct sufficient to justify the emergency instruction. *Cf. Davis v. Calhoun*, 128 Ga. App. at 107, 195 S.E. 2d 759 (1973) ("[T]he defendant did not contend that he had a

choice between attempting to stop and attempting to clear around the shoulder to the right.").

CONCLUSION

The respondents submits that, pursuant to the standard of Rule 10, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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